



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT KABARNET**

#### **CRIMINAL APPEAL NO. 95 OF 2017**

#### **[FORMERLY ELDORET CRIMINAL APPEAL NO. 51 OF 2014]**

**JOHN KIRUI.....APPELLANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

**[Appeal against conviction and sentence from Kabarnet Principal Magistrate's Court Criminal case no.720 of 2013 delivered on the 11<sup>th</sup> day of March, 2014] by Hon. E. Bett, Ag. SRM**

#### **JUDGMENT**

1. The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that the appellant on the 6/9/2013 at Kabartonjo in Baringo North District within Baringo County, while armed with a dangerous weapon namely a knife, robbed Musa Kiptarus Ksh.12,000/=, a pair of shoes and a phone make G-Tide 161 all valued at Kshs.17,000/= and or immediately before or immediately after the time of such robbery wounded the said Musa Kiptarus. The alternate was that the appellant on the 6/9/2013 at Kabartonjo in Baringo North District within Baringo County otherwise than on the course of stealing, dishonestly retained a mobile phone make G-Tide 161 knowing or having reasons to believe the same to be stolen. The trial court found the appellant guilty of the offence of robbery with violence and sentenced him to suffer death.

2. The appellant petitioned filed an appeal against the conviction and sentence and urged in his amended grounds of appeal that:

1. That the trial magistrate erred in law and fact by convicting me on contradictory and uncorroborated evidence adduce by the prosecution witnesses.
2. That the trial magistrate erred in both law and fact by believing that the complainant was stabbed with a knife without considering that the Clinical Officer who examined him concluded that the injuries were caused by blunt object.
3. That the trial magistrate erred in both law and fact by convicting me on prosecution case which was not proved beyond reasonable doubt as required by the law as it was not properly investigated.
4. That the trial magistrate erred in both law and fact by convicting me while on the alleged exhibits, mobile phone G-Tide in which the complainant did not proof ownership.
5. That the trial magistrate erred in both law and fact by convicting me without considering the variance between the main charge, alternative charge and the evidence tendered in court by prosecution witness.

3. By his written submissions the appellant discussed his grounds in four parts as follows:

1. Ground One and Two: poor inconsistent and uncorroborated contradictory evidence

PW1 is a single witness, he is the complainant, the investigator, the arrester alongside AP officers. If indeed PW1 knew the accused what were the investigations for? Were police reluctant on their work after reporting the incident? It is clear that the after consultations on the said stage PW1 provoked my arrest.

The evidence of PW1, PW2 and PW4 is not matching. The three witnesses participated in my arrest and also in preparing the P3 of this case. PW1 was treated in Kabarnet, PW2 reported he did not treat PW1 in the said facility. The P3 form does not support their

allegations, dated on 9/9/13 and filled 10/9/13.

I contend that the allegations of PW1 that he was stabbed by a knife, is not corroborating with PW2 who attended him. Instead he disapproves that his patient (PW1) had a swollen lip tender on touch and painful chest and not on the upper lip. The doctor concluded that the object causing injury was blunt. PW2 did not mention any cut wounds or stubbed wounds either in the hip or lip contrary to sharp object or weapon claimed by PW1.

I rely on the decision of **Richard Apela v. Republic** [1981] EA 945. Where the court held that:

*“Two contradictory statements cannot be admitted in court of law as evidence of truth. Either one is the truth or other one is not or may be both of them are not true, since there is no possibility for both to be admissible due to contradictory nature.”*

2. Ground Three and Four: Shoddy investigations of the case exhibits not probed for ownership.

PW1 alleges that he identified the number of the motorcycle as KMCT 800B being recalled back he stated the Reg. No was KMCT 800P and showed the same to the court and the court did not ascertain this. PW1 states his shoes were recovered at my place, I contend that nowhere in the entire proceedings showing that my house was visited and exhibit recovered as shoes; the accused was arrested with no phone and knife. There was no prove that the phone recovered was PW1's.

3. Ground Five and Six: defective Charges and unconsidered evidence

It should be noted that the alleged charges were drafted from OB 15 of 10/9/13 and OB 14/9/13 for the P3 Form this does not support the dates of both accounts.

I defended myself in court that I collected the said property, this is supported by some pieces of evidence of PW4 and PW2. The mud in the said exhibit is a clear indication that it was collected and not used by the accused person as a weapon since PW2 the doctor approved that it was a blunt object that caused injury to the complainant.

I tendered my evidence but was not considered by the lower court.

4. Ms. Kenei for the prosecution opposed the appeal by oral submissions in court, as follows:

*“Miss Kenei for DPP*

*Appellant charged with offence of robbery with violence contrary section 296 (2) of the Penal Code*

*Pw1 testified from page 15 – 18 that he arrived at 10.00am from Eldoret and proceeded to Kabartonjo.*

*He alighted at KCB stage where he saw the appellant as the bank is well lit. Appellant was well known to him as boda boda rider who had carried him on several occasions.*

*En route, the appellant turned on him and robbed him and injured him.*

*Pw2, the Clinical Officer noted injuries corroborates Pw3 wife of Pw1 who saw the physical injury.*

*Matter initially reported at AP Camp Kabartonjo as testified by Pw4 the arresting officer, who authorized Pw1 to seek medical attention and to notify him if he spots the appellant.*

*It is Pw1 who called Pw4, the arresting officer after spotting the appellant and Pw4 proceeded to arrest and conducted a search which produced the mobile phone shown by Pw1.*

*The issue as to the dates of arrest indicating 10/9/13 and another 9/9/13. The appellant was first taken to the AP's Camp Kabartonjo before being taken to Kabarnet police station and being booked.*

*Pw5 and Pw4, Investigating Officer and arresting officer stated that the accused was arrested on 8/9/13 and was brought from Kabartonjo AP Camp to Kabarnet police station on 9/9/2013. The contradictions as to dates are not fatal as the witnesses Pw1 – Pw5 were consistent on the chronological happenings of the incident. The appellant noted that Pw1's testimony was that he was stabbed with a knife. **However, on looking at the original police file there is an apparent error because Pw1 said he was slapped on the lip and not “stabbed on the hip” as typed***

**[Court to see the handwritten notes]**

*This is in line with the finding of Pw2 that Pw1 had injuries on the hip caused by a blunt weapon.*

*Appellant on Ground (5) and (6) that charge sheet is defective and that his defence was not considered by the court what is material when drafting the charge sheet is the date given in the productions of the offence. In this case, the incident was alleged to have*

happened on 6/9/2013. The O.B on the charge sheet 15/10/9/2013, P3 form dated in OB 14/10/13 is not fatal as it can be verified by production of the original OB.

Grounds 3 and 4 of appeal - ownership of exhibit not proved.

Pw1 reported that he was robbed of his phone shoes and money and the same recovered by Pw4. The appellant in giving his defence unsworn admitted to picking up the phone and a pen knife and keeping it to himself, and, corroborates Pw4 who arrested him and found him in possession of the phone.

He did not report the phone exhibit as it did not belong to him. Phone was positively identified by Pw1 and Pw3 the wife to the complainant.

Court considered the appellants defence in his judgment and dismissed the same. We pray that the court uphold conviction of the appellant.”

5. The prosecution had a total of five witnesses who gave evidence and testified as follows:

“1. **PW1** Musa Kiptarus Lambat

I come from Kabartonjo, I am a lecturer at KMTC Kabarnet, I know the accused well. He used to ferry me with his boda boda.

I remember on 6/9/2013 at 10pm I came from Eldoret late on arrival at Kabarnet I took a matatu to Kabartonjo, I alighted at Kabartonjo and saw the accused and he offered to take me home using his boda boda. I boarded his motorcycle registration no KMCT 800B at the stage next to KCB bank. He began to over speed, he hit the bumps and I tried to stop him, he then took a diversion to my place but stopped, the forest was ahead, he said the motor cycle had a puncture.

I took my G-Tide phone and lit a torch and saw it had no puncture, at that instant the accused slapped me; I fell down. He took out his torch and I directed my torch at him. He then took Ksh.300/= from my shirt pocket while strangling me. He then took my G-Tide phone valued at Kshs.2250/= I pleaded with him and even told him to take money on my jacket pocket. He took away the money Kshs.12,000/= in the process he slapped me on the upper lip and told me to shut up; he also took my pair of shoes valued at Kshs.3000/=. He told me he would finish me and I pleaded with him since I had children to take care of. I pleaded with him and he gave me a driving licence, told me to go away and led me towards the main road while holding me at the neck. He slapped me and I ran away; I heard him start his motor cycle and ran away. I arrived home at around 11pm bleeding from my mouth.

I changed my clothes at 1pm I came to Kabarnet health Centre and I was treated; I then came to Kabartonjo AP division and reported the matter. The AP officers told me to come to Kabarnet police station. On the 9<sup>th</sup> I came to Kabartonjo trading centre and decided to investigate the motor cycle. I saw the motor cycle and rushed to AP camp and told them I had seen the motor cycle. The AP officers called their counterpart in Kabartonjo trading centre and the accused was arrested and brought to trading centre.

He was charged and my phone recovered from.

They also recovered a knife from him. This is the knife he used. He also had Kshs.300/= which was his. I came to Kabarnet police station and I reported the matter and I was issued with P3 form; I took it to Kabarnet police station and I recorded my statement.

#### **Cross-examination by accused**

You came and pleaded for work to give you. I do not know of anyone else who saw us; you said your motor cycle had a puncture. I only with you, I bought the phone at Kshs.2250/=; you also took the money. The shoes were also recovered at your house in Kabartonjo. I boarded the motor cycle between KCB and district hospital. The boda boda park next to KCB and other motor cycle; there are security lights at the shop and that is how I identified you.

#### **Re-examination**

The accused had carried me severally using his motor cycle, I knew him well. My statement is clear I lost Kshs.12,000/=; once we searched him the first we recovered was my phone.

**PW1** – recalled for purposes of identifying the motor cycle used

I have testified on how the incident occurred, there was motor cycle which the accused used (KMCT 800P this is the motor cycle outside court.)

#### **Cross-examination by accused**

You sought my services; it was not the first time you were carrying me.

#### **Re-examination**

*He had carried me even before using his motor cycle.*

6. **PW2 Benjamin Kandagor**

*I am a Clinical Officer at Kabarnet district hospital, I am the one who filled his P3 form on 9/9/2013 in respect of Musa Kiptarus 52 years old. He allege to have been assaulted on 6/9/2013 by person known to him and in the process sustained injuries on the upper limbs; he had been treated at Kabartonjo on 6/9/2013. The upper lip was swollen and tender on touch, mid chest sternum was painful on touch; injuries were hours old and as a result of blunt tool. I classified the degree of injury as harm.*

**Cross-examined**

*I saw him on 9/9/2013, he had been treated on 6/9/2013 the lip was swollen and was so even at the time he came.*

7. **PW3 Jane Kiptarus**

*I come from Kabartonjo, I am a house wife, I know the complainant he is my husband. On 6/9/2013 the complainant came home and shouted while he was outside that he had seen death; I opened the door and saw he had torn shirt and did not have any shoes. He was also bleeding from the mouth, he told me Galaxy had beat him; I told him Galaxy could not have done it as he normally bring us home on so many occasions. We normally call the accused Galaxy as he had a M/cycle with that name on it. The accused had brought my husband on so many other times before.*

**Cross-examination by accused**

*I am only telling the court what I saw when the complainant came home. My husband had brought the torn shirt to court and had injuries even on the chest. I have also used your motor cycle before.*

8. **PW4 No. 1996061345 AP Isaac Kimutai**

*I am from Deputy County AP camp at Kabartonjo, I came to know the accused and the complainant from this incident. On 6/9/2013 I was at Kabartonjo station at 11pm when the complaint came to the station with injuries on the mouth and reported of having been robbed by a bodaboda operator he had boarded. I advised him to seek medication, he gave me the motor cycle registration no. KMCT 800P. On 8/9/2013 the complainant came and told us he had seen the motor cycle. We went to him to Kabartonjo stage and saw the motor cycle; we waited for 30 minutes and the accused came and we arrested him. We took him to Kabartonjo AP and came later for the motor cycle. **We searched the accused and found with him two phones and a knife; Musa said this phone G-Tide is his, and he also had some cash.** I brought the accused to Kabarnet Police station and recorded my statement.*

**Cross-examination by accused**

*I am telling what I did since the matter was reported. I only recovered from you two phones and a knife, he had reported of also being robbed of shoes; we did not recover the shoes from you. I was not there when the incident occurred. I did not get you with a sword but a pen-knife, the knife is capable of inflicting harm, and the knife had mud on it. Nobody asked you for Kshs.10,000/=, the complainant is the one who said the phone is his. I do not know about the amount that was stolen. Lambat never knew you. We arrested you at Kabartonjo bus stage. The line was part of the evidence.*

**Re-examination**

*The complainant came and told us he had spotted the motor cycle and we went and saw it. When we reached the police station the accused said we remove his sim card which was in the phone; I declined and left everything to the Investigating Officer. We do not take bribe as police.*

9. **PW5 No. 54272 PC Peter Kinuthia**

*From Kabarnet police station, I am attached at crime and investigations, I am the investigating officer in this case. On 9/9/2013 I was at Kabarnet Police station at 10am when the accused was brought by AP from Kabartonjo and the complainant. I investigated them and got a report of robbery from the complainant. **He alleged he boarded a motor cycle and on the way the accused stopped the motor cycle and removed a knife and took Kshs.12,000/= and a G-Tide phone.***

*The accused was brought together with the phone and a knife. I charged the accused with the offence. The complainant identified the phone from the marking of the battery and a crack and the motor cycle. We could not carry out an identification parade as the complainant had identified the accused to the arresting officer.*

*The cash was not recovered.*

**Cross-examined by accused**

*I am telling the court of how I received the report. It depends if the complainant was tired he could not come after you instantly. This cap is the one alleged you were wearing, it is not part of the exhibit.*

## **Re-examination**

The offence occurred on 6/9/2013 and the accused was brought on 9/9/2013; he was arrested on the night of 8<sup>th</sup>.

10. When put on his defence, the appellant as **DW1** gave an unsworn statement and stated that:

*“I am John Kirui from Moigutwo sub-location, I am a boda boda operator. On 6/9/2013 it was on Friday at 10pm when I got a customer going past Kabartonjo High School; I took the customer to his destination. On my way back 100 metres from Kabartonjo High School I heard noises from some people ahead of me; these people were quarrelling and asking why they were quarrelling each other and they were drunk. I reached a short cut close to where these people and I could not see anybody, I only saw a phone, pen knife attached to a nail cutter and a bottle opener and a bottle of half consumed spirit. I stopped the motor cycle and collected the phone and the pen knife. The phone resembled that of a customer by name Blacky; I called out Blacky’s name but there was no response. I continued with my journey while having the phone and the pen knife; on arrival at the stage as it was late and the AP officer told me operating hours was now over. I went home and inspected the phone; the phone had now switched off as I had sat on it. I slept on the following day I woke up and went to town at 10pm, upon parking my motor cycle I went to a place where we play cards. Before I arrived I met one Harrison who told me he had been looking for me for long; he told me he had seen me yesterday collecting property which belonged to him, a G-Tide phone. I had the phone in my pocket and showed to him, I told him to tell me the pin number of the phone so that I could know it was his. The number he gave me was rejected by the phone; he told me he had forgotten the actual pin and could bring the green card that evening. I asked him what else he had lost and said it was only the phone; I showed him the pen knife and he told me it was not his. I continued with my business as we agreed he would meet me once he had the green card.*

*In the evening I saw him in the stage and he told me we meet tomorrow.*

*He then told me not to ask for another owner of the phone as the phone was his.*

*The following day on Sunday the 8<sup>th</sup> I saw my friend at the stage and he told me he looked for the green card but did not get. At 3pm I was coming from lunch going to where I had parked my motor cycle and I met Mr. Mutai an AP officer, he asked me if I was the owner of the motor cycle and I told him yes. He asked me my names and I told him I was John Kirui he then asked me about an incident of Friday and I told him how I had collected a phone and the pen knife. My phone charge was getting low, he told me he wanted to know if the phone I had was mine. He then removed his line and the other line. He inserted my pin into another phone and told me to key in the pin which I successfully did. He then took a sim card in the complainant’s phone and put in his pocket; then told me he had some reports of robbery, then asked me to give Kshs.10,000/= and he would settle the matter that instant with the complainant, told him I do not have the money to bribe.*

*He called his colleague and they took me to the station. Others came and pushed my motor cycle to the station. On arrival to the office, Mr. Mutai took the phone and the pen knife and put them in my pocket; I asked him why I could not have my sim card back and he said that would be an exhibit.*

*On arrival at the office I found the complainant with Harrison, I had not known him by then, Mr. Mutai searched me and removed the phone and pen knife; I got surprised that the phone had another owner, the complainant said the phone was his and Harrison had assisted him identify the phone.*

*I asked Mr. Mutai for the complainant’s sim card and he had denied any knowledge of it; he said he had found me using the phone. Then Harrison, and, the complainant left, Mr. Mutai then called them and they told them to meet them at town, I was left alone.*

*At 8pm they brought supper for me, at 10pm Mr. Mutai come; they had handcuffed me against the handle of cupboard. Mutai told me to say the whole truth. He slapped me twice and told me he was going to “charge” first and would come back after 10 minutes; he came back carrying a club and a whip; he was drunk, the other officers stopped him from whipping me and took me outside.*

*I slept, in the morning Mr. Mutai asked me for my accomplice; I told him I had not stolen from anybody, he went away at 9pm Mr. Lambat came and Mr. Mutai told him to run to hospital and pretend he had been beaten and injured. The complainant came back after 30 minutes and called me inside told me he had nothing against me since he had recovered his phone; he told me I give him Kshs.10,000/= to sort out the officers, I told him I had no money. Mr. Mutai told him to say that I had carried him using my boda boda and robbed him. I went back and told the Corp. AP that this people were refusing to hear my side, told me to allow the case to go to Kabarnet; also advised me to go before court to prevent the people from exhorting money from me and others. I went to the office of the DC and sought his help, he advised me to take the issue to Kabarnet; I went out and Mr. Mutai went to the office and advised to take the case to Kabarnet. Mr. Lambat was there and he inquired from Mr. Mutai then coached Mr. Lambat that once we were in Kabarnet he would say I had carried him on my motor cycle and we were with him alone and that at some point I had attacked. Mr. Mutai then came and told me that if we are to go to court I should not ask him more than two questions at the dock, he then told me that even if I succeeded in the case he would deal with me outside. We left and went to the stage.*

*I met a man I knew borrowed his phone and called my relatives, Mr. Mutai then told me that my motor cycle would never get out of police. We boarded a motor vehicle and come to Kabarnet police station, while on the way Mr. Mutai kept telling me they would work hard to make me stay in jail. Mr. Mutai told me I must be a thief as I had a motor cycle, then asked for some details and Mr. Mutai that they should let me go, Mr. Mutai refused and said I had to part with some money.*

*We alighted and 20 metres from the police station they stopped and talked, I heard Mr. Mutai reciting the plan of what to say and concluded talking. Mr. Mutai removed a camera and took a photo of me and he told me he was with me until the end. We arrived and they recorded their statement as I was booked in the cells.”*

## Issues for determination

11. The issues to be determined are whether the evidence before court support the charge of robbery with violence contrary to section 296(2) of the Penal Code as charged; whether a pen knife is a “dangerous weapon” within the meaning of that section and whether the accused committed the said offence.

## Determination

12. The ingredients of the offence of Robbery with violence contrary to section 296(2) as distinguished from simple robbery under section 296(1) of the Penal Code have been settled in **Oluoch v. Republic** [1985] KLR 549, 550 where the Court of Appeal held:

*“Under section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances:*

- 1. The offender is armed with any dangerous or offensive weapon or instrument, or*
- 2. the offender is in company with one or more other person or persons or*
- 3. at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.*

*The ingredients of the offences of robbery under section 296(1) of the Penal Code are:*

- a) stealing anything and*
- b) at or immediately before or immediately after the time of stealing,*
- c) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.*

*So, it is not the degree of actual violence used that differentiates the two offences as the senior resident magistrate stated.”*

13. Regrettably, the typed record of the trial court did not accurately reflect the trial magistrate’s handwritten notes, with serious distortion that the evidence by PW1 of having been slapped on the upper lip is recorded as a stab on the hip. It is clear from the handwritten record of the trial court as conceded by the DPP that the violence was in respect of “a slap on the lip” not a stab on the hip as the typed record shows. I have perused the original record of the trial court where the complainant testifies as follows:

***“He then took my G-Tide phone valued at Kshs.2250/= I pleaded with him and even told him to take money on my jacket pocket. He took away the money Kshs.12,000/= in the process he slapped me on the upper lip and told me to shut up; he also took my pair of shoes valued at Kshs.3000/=. He told me he would finish me and I pleaded with him since I had children to take care of. I pleaded with him and he gave me a driving licence, told me to go away and led me towards the main road while holding me at the neck. He slapped me and I ran away.”***

## Dangerous weapon

14. A pen knife is not made for causing injury to the person. It may only be a dangerous weapon if the person wielding it intends to use it for purposes of causing injury. The weapon used in a robbery with violence has the same meaning of a dangerous weapon is presumed in section 89(1) of the Penal Code as held in **Kimemia & Anor. v. Republic** [2004] (2) KLR 46, 55 the Court of Appeal holding that:

*“Section 89(1) of the Penal Code creates the offence of possession of a firearm or other “offensive weapon” etc. and section 89(4) of the Penal Code defines “offensive weapon” for purposes of section 89 as meaning:*

*“Any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use.”*

*In Mwaura and others v. Republic* [1973] EA 373 the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were “dangerous or offensive weapon” for the purpose of the offence of preparation to commit a felony under section 308 (1) of the Penal Code held at page 375 letter F:

*“In our view “dangerous or offensive weapons” means any article made or adapted for use for causing injury to the person such as a cosh knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person”.*

*The High Court followed that interpretation in Muthoni v. Republic* [1981] KLR 46 at page 473 paragraphs 1-5.

*In our view the words “dangerous or offensive weapon” in section 296 (2) of the Penal Code bear the same meaning as section 89 (4) of the Penal Code and as instructed in the case of Mwaura & another v Republic (supra) for the purposes of section 308(1) of the Penal Code.*

**There cannot be any doubt that although a knife is not made or adapted for use for causing injury to a person, it would nevertheless be a dangerous or offensive weapon for purpose of section 296(2) of the Penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person.**

(See also *Ganzi & 2 others v. Republic* [2005] 1 KLR 52, 57)

15. There was no evidence by the complainant that the appellant had wielded the Pen knife or attempted to use a pen knife to inflict injury on him during the alleged robbery. Indeed, the complainant only refers to the pen knife as one of the items, together with the phone, that were allegedly recovered from the appellant. The reference to the pen knife as a weapon appears to have only been the testimony of the Investigating Officer (PW5) when he said:

**“He alleged he boarded a motor cycle and on the way the accused stopped the motor cycle and removed a knife and took Kshs.12,000/= and a G-Tide phone.”**

I do not find that the attacker was armed with a dangerous weapon.

#### ***Wounding, beating, striking etc.***

16. Wounding, beating, striking or use of other **personal** violence is one of the three ingredients of the offence of robbery with violence. There was evidence of wounding and striking in the testimony of the complainant, his wife PW3 and the Clinical Officer (PW2) who testified to injuries on the upper lip and chest of the complainant. With the evidence of striking and wounding, the offence of robbery with violence contrary to section 296(2) of the Penal Code is proved notwithstanding lack of proof of use of any dangerous weapon or the company of one or more attackers.

#### ***Unsworn statement of the Appellant***

17. Although the appellant gave a long unsworn statement with which he sought to extricate himself from the alleged robbery on the claim that he had only found the phone and a pen knife after he stumbled upon a scuffle involving a group of people. The appellant's statement was not tested by cross-examination and its value as held in *May v. R* (1981) KLR 129 is little. But the accused is not required to prove his innocence. I only considered this statement to see whether a reasonable doubt in the context of the entire evidence before the court is raised thereby. Without placing the burden of proof on the accused, the evidence of the accused's Harrison who had alleged claimed to own the phone recovered by the appellant could have strengthened the “finder's theory” that the appellant put forward. Otherwise, the claim that the appellant had found the phone identified by the complainant and his wife (PW3) as belonging to the complainant does not raise a reasonable doubt.

#### **Conclusion**

18. From the evidence before the court in this matter as whole, it does appear that the complainant was robbed of his mobile phone and shoes during the stealing of which the appellant slapped the complainant on his upper. The appellant was known to the complainant and his wife and his identification leading to his arrest was proper. There was however no sufficient proof of the complainant's possession and consequently loss of money in the sum of Ksh.12,000/- as alleged, I therefore do not find the theft of the money proved.

19. For the reasons set out above, I find the appellant guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

#### ***Judgment of the trial court***

20. Although, the finding of the trial court on the proof of the ingredients of the offence of robbery with violence is valid, the statement in the typed record judgment of the court that the appellant “**had stabbed him on the mouth with a knife**” is not accurate reflection of the handwritten record showing the PW1 statement's that “*he slapped me on the upper lip and told me shut up.*”

#### **Sentence**

21. Although the offence of robbery with violence is complete notwithstanding the degree of violence, having regard to the slight nature of the injury resulting from his having been slapped on the upper lip and the nature of the violence as mere slapping rather than stabbing as the typed record indicates and the small value of the stolen items, I consider that an imprisonment for a term of seven (7) years should be sufficient punishment. The trial court had acted on the conventional legal view that the death sentence was a mandatory sentence. It is now settled by the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR that the death sentence is not a mandatory sentence, and the trial court's sentence of death imposed on the appellant is set aside.

22. The appellant has been in custody since the 8<sup>th</sup> September 2013 when he was arrested, according to the Investigation Officer PW5, before charge in the trial court. He has therefore been in custody for over 5 years. With remission, the appellant would have, for the sentence of imprisonment for 7 years, stayed in custody for a period of 4 years and six months.

23. There shall, therefore, be an order directing that the appellant be immediately released from custody unless he otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED ON 29<sup>TH</sup> DAY OF OCTOBER 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person

Ms. Kenei, Prosecution Counsel, for DPP